In The

Supreme Court of the United States

October Term, 1976

No. 76-187

BACHE & CO. INC.,

Petitioner,

vs.

CY SEYMOUR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Honorable, the Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:

The petitioner, Bache & Co. Inc., respectfully prays that a writ of certiorari issue to review an order of the United States Circuit Court of Appeals for the Second Circuit entered in this proceeding on May 12, 1976.

OPINION BELOW

The opinion of the Court of Appeals and of the United States District Court for the Southern District of New York appear in the Appendix hereto.

JURISDICTION

The order of affirmance of the Court of Appeals for the Second Circuit was entered on May 12, 1976.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is a customer's contractual obligation to arbitrate disputes with his broker, unenforceable by reason of the Securities Exchange Act of 1934, even where the agreement to arbitrate was executed after the occurrence of the events upon which the customer's claim is based?

The court answered in the affirmative.

2. Does *Wilko v. Swan,* 346 U.S. 427 (1953), which held that parties cannot be required to arbitrate post-agreement controversies, extend also to pre-agreement controversies?

The court answered in the affirmative.

3. Where the wrongs complained of constitute a common law cause of action, and such a cause of action is pleaded, does *Wilko v. Swan* bar arbitration because the acts complained of are also alleged to constitute violations of the Securities Exchange Act of 1934?

The court answered in the affirmative.

STATEMENT OF THE CASE

This petition presents a question of first impression which arises in the following context.

The plaintiff-appellee (hereinafter plaintiff) has been actively trading in the stock market for many years. The defendant-appellant Alex Canaan (hereinafter Canaan) was the plaintiff's "customer's man" during all those years. The plaintiff followed Canaan, as his customer, as Canaan moved from one brokerage firm to another. In July of 1969 Canaan was in the employ of the defendant-appellant Bache & Co. Inc. (hereinafter Bache). The plaintiff was one of Canaan's customers. Some time later Canaan left Bache, went to work for another brokerage house, and took the plaintiff and some of his other customers with him.

In January of 1973 Canaan returned to the employ of Bache, again bringing the plaintiff with him as a customer. At that time the plaintiff entered into an agreement with Bache, dated June 4, 1973, which contains a general arbitration clause.

All of the acts complained of by the plaintiff occurred prior to June 4, 1973, when the agreement to arbitrate was executed. The plaintiff complains that Canaan advised him to engage in an excessive number of transactions, *i.e.,* "churning." The churning is claimed to have occurred during the period "from July 22, 1969 to July 1, 1972." The last "churning" transaction is claimed to have been consummated on July 1, 1972. The agreement to arbitrate was executed one year *after* that last transaction.

The essence of the plaintiff's complaint is that Bache did not adequately supervise Canaan, who, by reason of such inadequate supervision, was able to recommend that the plaintiff authorize Canaan to make the purchases and sales of securities, which the plaintiff now claims amounts to "churning."

The acts complained of, as against Canaan or as against Bache, constitute a common law cause of action.

Plaintiff also alleges that the same acts constitute a violation of the Securities Exchange Act of 1934. The plaintiff's complaint is complete without this allegation, but the allegation is added in an attempt to avoid the post-churning agreement to arbitrate disputes, it being hoped (by plaintiff) that *Wilko v. Swan* will be enlarged to bar arbitration, even when the agreement to arbitrate is executed after the occurrence of the acts complained of.

The affidavits in support of the Bache motion to stay the action on the ground of an existing valid agreement to arbitrate all disputes between the parties, are not controverted. The plaintiff submitted no affidavit in opposition to the Bache motion in the District Court, the purpose of which was to compel the plaintiff to arbitrate his dispute with Bache, as his agreement requires.

The question of first impression presented here is:

> May a party avoid his written agreement to arbitrate, where, unlike *Wilko v. Swan,* the alleged securities act violations had already occurred, at the time of the making of the agreement to arbitrate?

REASONS FOR GRANTING THE WRIT

Affirming Judge Tenney's decision is further to expand the rule of *Wilko v. Swan, supra,* making another inroad and restriction upon the freedom to contract, in this instance at the expense of the otherwise desirable alternative of arbitration.

The issues in *Wilko v. Swan* were, as are the issues here, simple. In *Wilko v. Swan,* the agreement to arbitrate was entered into prior to the commission or occurrence of the acts

complained of. It was this agreement to arbitrate, in advance of the occurrence of the dispute, that was held to be void. However, since *Wilko v. Swan,* it has been held that a party may agree to arbitrate issues stemming from violations of the Securities Act, when the agreement to arbitrate is not executed before the acts complained of occurred. In this case, the acts complained of had already occurred when the plaintiff agreed to arbitrate all disputes. Nevertheless, in Judge Tenney's view, even such an agreement to arbitrate will be enforced, only where the plaintiff has been advised by his attorney, before the agreement is signed, of the different factors that might be considered in deciding in favor of litigation as against arbitration. It is only then, according to Judge Tenney, that a party may waive his right to litigate as distinguished from his right to arbitrate.

The plaintiff cannot fairly argue that by being compelled to arbitrate, he is being deprived of anything that could even remotely approach the importance of a constitutional right.

The petitioner urges that this case presents an excellent opportunity to restore the forum of arbitration as the most efficient method of resolving disputes between businessmen.

Judge Tenney presumed, without any supporting evidence, that the plaintiff was ignorant of what had transpired in his account during the period prior to his execution of the agreement to arbitrate, and that he lacked the knowledge necessary to agree to arbitrate rather than litigate. Since there was no affidavit submitted by the plaintiff, the conclusion by Judge Tenney that the plaintiff lacked sufficient knowledge must be the result of a presumption, a presumption which we suggest was unwarranted.

The petitioner urges that it does not endanger the spirit of the Securities Acts to hold that a customer should not be presumed to lack such capacity when he signs an agreement to arbitrate, after the acts complained of occurred. The plaintiff

complains of each and every one of 620 separate transactions consummated in his behalf by Bache. But he does not deny that following each transaction, which occurred from time to time over a period of four years, he received a written confirmation of the transaction. Nor does he deny that after all of these transactions had been consummated, he entered into the agreement to arbitrate all disputes with Bache, an agreement Bache now seeks to enforce.

In this action the plaintiff should have the burden of proof to demonstrate that although he signed this arbitration agreement one year after the last of the wrongful acts occurred, he nevertheless failed to possess the necessary capacity intelligently to choose arbitration as distinguished from litigation.

To presume, as Judge Tenney did, that the plaintiff lacked such capacity, or that the burden is upon the petitioner to prove that he had that capacity, has the practical effect of eliminating arbitration as a practical forum for the resolution of disputes in the securities industry.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and order of the Court of Appeals for the Second Circuit.

Respectfully submitted,

s/ Michael M. Platzman
Attorney for Petitioner

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of Bridgeport, Conn., on the 12th day of May, one thousand nine hundred and seventy-six.

Present:

HON. WILLIAM H. TIMBERS
Circuit Judge
HON. LLOYD F. MacMAHON
HON. JON O. NEWMAN
District Judges
Sitting
by Designation

(Filed May 12, 1976)

CY SEYMOUR,

Plaintiff-Appellee,

-against-

BACHE AND COMPANY, INCORPORATED, and ALEX CANAAN,

Defendants-Appellants.

Opinion of the United States Court of Appeals

76-7058

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is *affirmed* on the opinion of Judge Tenney filed January 14, 1976 and on the authority of *Wilko v. Swan*, 346 U.S. 427 (1953).

s/ Wm. H. Timbers
WILLIAM H. TIMBERS
Circuit Judge

s/ Lloyd F. MacMahon
LLOYD F. MacMAHON
District Judge Sitting
by Designation

s/ Jon O. Newman
JON O. NEWMAN
District Judge Sitting
by Designation

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CY SEYMOUR,

Plaintiff,

-against-

BACHE & CO. INC. and ALEX CANAAN,

Defendants.

75 Civ. 3722 (CHT)

(Filed January 14, 1976)

TENNEY, J.

Defendants Bache & Co. Inc. ("Bache") and Alex Canaan ("Canaan"), a Bache employee,[1] seek an order of this Court staying the instant action pursuant to 9 U.S.C. § 3 on the ground that a valid arbitration agreement exists between the parties and that the arbitration should be allowed to go forward. For the reasons set forth below, the motion is denied.

On December 5, 1970, plaintiff entered into a margin agreement with Bache. Paragraph 14 of that agreement provides for the resolution of any controversies arising thereunder in an arbitral forum. Paragraph 14 states in pertinent part:

> "This contract shall be governed by the laws of the State of New York . . . . Any controversy arising out of or relating to my account, to

> transaction with or for me, or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then obtaining of either the American Arbitration Association or the Board of Governors of the New York Stock Exchange, as I may elect . . . . If I do not make such election by registered mail addressed to you at your main office within five days after demand by you that I make such election, then you may make such election."

On June 4, 1973, plaintiff again signed a margin agreement containing the same arbitration clause.

Plaintiff commenced the instant action on July 31, 1975, charging defendants with violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, as well as several breaches of common law fiduciary duties. The gravamen of the action is "churning".

The issue before the Court is the enforceability of the arbitration agreement in light of the holding of the United States Supreme Court in *Wilko v. Swan,* 346 U.S. 427 (1953).

In *Wilko,* a stock purchaser brought suit charging a brokerage house with a violation of Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2), based on certain misrepresentations and omissions. Plaintiff had signed a margin agreement containing an arbitration clause similar to that signed in the instant case. The Court found that the arbitration agreement was a "condition" or "stipulation" within the meaning of Section 14 of the Securities Act of 1933, 15 U.S.C. § 77n, which states:

> "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

Hence, the agreement was held to be unenforceable. Noting "the desirability of arbitration as an alternative to the complications of litigation," *id.* at 431, the Court nevertheless held that Congress had taken great pains to protect the rights of the buyer of securities and had clearly expressed its intention to forbid the waiver of those specifically created rights. *Id.* at 438. The waiver, of course, is implicit in the agreement to arbitrate.[2] The rule enunciated in *Wilko* has been held to apply to the Securities Exchange Act of 1934 as well.[3] *Maheu v. Reynolds & Co.,* 282 F. Supp. 423 (S.D.N.Y. 1967); *Stockwell v. Reynolds & Co.,* 252 F. Supp. 215 (S.D.N.Y. 1965); *Reader v. Hirsch & Co.,* 197 F. Supp. 111 (S.D.N.Y. 1961).

Defendants, in the instant case, attempt to distinguish the facts herein from those in *Wilko* by pointing out that the parties had been engaged in a course of conduct for some seventeen or eighteen months prior to the signing of the agreement in question and presumably some of the alleged violations had already occurred. Thus, defendants conclude that there was no waiver of rights as to future disputes since the violations had presumably already occurred, at least in part, and any rights attendant thereto had presumably accrued. To further buttress this position, defendants cite a second margin agreement signed by plaintiff on June 4, 1973. Defendant would have this Court hold that only where a plaintiff signs an arbitration agreement before any of the violations occurred would the agreement be voided. The Court will not adopt so narrow a view of the Supreme Court's holding in *Wilko.*

There have been cases which have upheld the integrity of an agreement, such as an agreement to arbitrate (which involve some waiver of rights). *Moran v. Paine, Webber, Jackson & Curtis,* 389 F.2d 242 (3d Cir. 1968).

In *Moran,* plaintiff complained of certain misrepresentation made in conjunction with purchases for her margin account as well as general overactivity. After lengthy consultation with both the New York Stock Exchange and with the Securities and Exchange Commission (both advised that she seek her remedy at law), plaintiff entered into an agreement to arbitrate the controversy. Plaintiff prevailed in the arbitration, but took an appeal as to the size of the damage award. The arbitral award was upheld throughout the state court system of Pennsylvania and plaintiff then turned to the federal courts. The federal appellate court considered, *inter alia,* the enforceability of the arbitration agreement in light of *Wilko v. Swan, supra,* 346 U.S. 427, and noted with regard to the parallel provisions of the 1933 and 1934 Acts:

> "The non-waiver provision is almost identically worded in each Act wherein provision is made that any condition or stipulation binding any person to waive compliance with any section of the Act is void." *Id.* at 245.

The Court went on to distinguish *Wilko:*

> "The Court there [in *Wilko*] held that the non-waiver provision of the statute was void as to future arbitration controversies and held that under such circumstances the right to select the judicial forum was one that could not be waived. However, the instant case is on a different footing in that here the Arbitration Submission Agreement was to submit an existing controversy

> between the parties to arbitration and that differentiation expresses itself in Wilko v. Swan, supra, at p. 438, 74 S.Ct. 182, as well as in the concurring opinion of Justice Jackson, pointing to the fact that present controversies are arbitrable." *Id.* at 246.

Judge Conner of this court, in *Korn v. Franchard Corporation,* 388 F. Supp. 1326 (S.D.N.Y. 1975), explained the rationale underlying the enforceability of the waiver provision:

> "Section 29(a) and its counterparts, which can be found in all six federal securities acts, prevent professional broker-dealers from circumventing the provisions of those acts by invalidating any attempt to obtain anticipatory waivers of compliance with the provisions of the Securities Exchange Act of 1934, Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953); Junker v. Midterra Ass. Inc., 49 F.R.D. 310, 313 (D.C. 1970), and should not be construed to apply to the release of matured claims. To rule otherwise would foreclose the parties from settling matured claims and force every claimant to pursue the litigation to its costly conclusion. Many small but otherwise settleable cases would have to be dropped and many large but otherwise settleable cases would clog the dockets of the federal courts. This would not only constitute a blow to judicial economy, but to justice and common sense as well." *Id.* at 1329.

Some additional guidance is given by Mr. Justice Jackson in his concurrence in *Wilko* where he states:

> "I agree with the Court's opinion insofar as it construes the Securities Act to prohibit waiver of a judicial remedy in favor of arbitration by agreement made before any controversy arose. I think thereafter the parties could agree upon arbitration." *Wilko v. Swan, supra,* 346 U.S. at 438.

The principle which emerges from these cases is that while no waiver *in futuro* will be allowed, a waiver will be allowed when made at a time when a "controversy" is in existence and when a party has full knowledge of the facts therein. The key seems to be that in the latter instance the party is in a position to examine the alternatives, to seek counsel, and to make an informed judgment *prior* to the waiver of important rights secured to the stock purchaser by Congress.

The waiver contained in the instant arbitration clause, signed in December of 1970, even if after some of the alleged violations had occurred, was sufficiently in advance of the existence of a controversy to void the agreement. Plaintiff was simply not in a position in December of 1970 to make a voluntary and intelligent waiver of important rights. The fraudulent scheme charged in the complaint was on-going and extended well beyond December of 1970. Thus, even if acts prior to that date could arguably be the subject of an arbitration agreement, clearly those later acts would not properly be the subject of a valid agreement.

The margin agreement signed by plaintiff on June 4, 1973, when he returned his account to Bache is likewise of no avail. When plaintiff returned to Bache in 1973 a new relationship was instituted. The margin agreement signed in furtherance of this new agreement cannot be construed as granting a waiver retroactively to all past acts, particularly those the subject of the previous business relationship. Even if it could be argued that

the dates of the margin agreements might confer jurisdiction as to some transactions and not as to others, judicial economy dictates that this entire matter be tried in one forum. This conclusion is further supported by the apparent presence of defendant Canaan as the common thread that runs throughout the scenario.

The Court must make two final observations. First, while some courts have allowed the common law claims to proceed in the arbitral forum and left the securities claims to the courts, this has not been done where, as here, the issues are complex and intertwined. *Shapiro v. Jaslow,* 320 F. Supp. 598 (S.D.N.Y. 1970). Second, there has been no authority proffered by defendant Canaan which would permit him to enjoy the benefits of the arbitration agreement signed by Bache. Even if it could be argued that he somehow fell within its ambit while he was employed at Bache, clearly his acts while employed at Weis, Voisin & Co., Inc., were not covered.

Accordingly, defendants' motion to stay the instant proceeding is denied.

So ordered.

Dated:
New York, New York
January 14, 1975

CHARLES H. TENNEY
U.S.D.J.

CY SEYMOUR,

Plaintiff,

75 Civ. 3722 (CHT)

-against-

BACHE & CO. INC. and ALEX CANAAN,

Defendants.

FOOTNOTES

1] Canaan was employed by Bache from July 1, 1969 until July 1, 1972, and from May 1, 1973 until May 1, 1974. From July 1, 1972 until May 1, 1973, Canaan was employed as a security salesman at Weis, Voisin & Co., Inc. During each of these time periods, Canaan was the representative in charge of plaintiff's account.

2] Defendants' counsel, in a recent letter to the Court, have cited the case of *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), for the proposition that *Scherk* limited *Wilko* by restricting its application to the 1933 Act. Therefore, defendants conclude that *Wilko* would have no application to the instant case since it alleges violations of the 1934 Act. Suffice it to say that defendants have misread *Scherk* which limits the application of *Wilko* when it comes into play with international arbitration agreements. In *Newman v. Shearson, Hammill & Co., Inc.*, 383 F. Supp. 265 (W.D. Tex 1974), the court held:

> "Defendant's argument that *Wilko* was overruled by Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), is incorrect as that case simply carved out a narrow exception to the *Wilko* holding, and is applicable only to international transactions." *Id.* at 263.

3] Section 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc, is the equivalent of Section 14 of the 1933 Act and states:

> "(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-187

BACHE & CO., INC.,

Petitioner,

—v.—

CY SEYMOUR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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2. Did the United States District Court, Southern District of New York, err when it denied a motion to stay a securities action when the complaint alleges violations of the 1934 Securities Exchange Act[1] but not the 1933 Securities Act[2]?

STATEMENT OF THE CASE

Plaintiff Cy Seymour ("Seymour") instituted this action against Defendant Bache & Co. Inc. ("Bache") and defendant Alex Canaan ("Canaan") to recover damages caused by the churning of Seymour's securities account.

The complaint alleges that Canaan was Seymour's account executive from July 1, 1969 to May 31, 1974.[3] During this time period, Canaan was employed by Bache from July 1, 1969 through April 30, 1972. Canaan was then employed by the brokerage firm of Weis Securities Inc. from May 1, 1972 through April 30, 1973. Canaan then returned to Bache and was employed by them from May 1, 1973 through May 31, 1974.

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1 15 U.S.C. 78a et. seq. (hereinafter "the 1934 Act").

2 15 U.S.C. 77a et. seq. (hereinafter "the 1933 Act").

3 The allegations of the complaint should be taken as true when a Court determines whether to grant a defendant's motion to stay an action because of an agreement to submit disputes to arbitration. See Maheu v. Reynolds & Co. 282 F.Sup. 423, 428. (S.D.N.Y. 1967).

On December 5, 1970, Seymour entered into a margin agreement with Bache which contained an arbitration provision.[4] When Canaan returned to Bache, Seymour signed another margin agreement on June 4, 1973, which contained the same arbitration provision as the December 5, 1970 agreement.

The complaint alleges that from July 1969 until May 1974, Canaan exercised control over Seymour's account and caused an excessive number of transactions in Seymour's securities account. The complaint also alleges that Bache, among other things, failed to properly supervise the activities of Canaan. The acts of Canaan and Bache are alleged to be violations of Rule 10b-5 of the 1934 Act.[5]

Bache and Canaan then moved on or about September 4, 1975 to stay the action on the ground that there was an agreement to arbitrate any disputes. Seymour submitted a memorandum of law in opposition to the defendants' motion.

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4 This provision states in pertinent part that:

> This contract shall be governed by the laws of the State of New York....any controversy arising out of or relating to my account, to transactions with or for me or to this agreement or to the breach thereof, shall be settled by arbitration in accordance with the rules then obtaining of the American Arbitration Association or the Board of Governors of the New York Stock Exchange, as I may elect....

5 17 C.F.R. Section 240.10b-5.

On January 14, 1976, the United States District Court, Southern District of New York, Charles H. Tenney, J., denied the defendants' motion to stay the action on the ground that the agreement to arbitrate was not enforceable in light of the holding of the United States Supreme Court in Wilko v. Swan, 346 U.S. 427 (1953). On May 12, 1976, the United States Court of Appeals for the Second Circuit summarily affirmed the memorandum decision of Judge Tenney.

POINT I

SEYMOUR DID NOT HAVE KNOWLEDGE OF HIS CLAIM OR OF THE EXISTENCE OF A CONTROVERSY WHEN HE SIGNED THE MARGIN AGREEMENT AND THUS THE LOWER COURTS PROPERLY REFUSED TO STAY THIS ACTION

In Wilko v. Swan, supra, a stock purchaser brought suit against a brokerage house, charging violations of Section 12(2) of the 1933 Act. The plaintiff in Wilko had signed a margin agreement with a broadly worded arbitration provision. The Court held that the arbitration clause was a condition and waiver within the meaning of Section 14 of the 1933 Act, which states that such conditions and waivers are void. Accordingly, the Court held that the arbitration clause was unenforceable.

Bache contends that because Seymour signed the June 4, 1973 margin agreement after all the disputed transactions took place, Wilko is not applicable. Petition, page 4.

This contention overlooks the nature of a churning scheme. While a victim of a churning scheme may be aware of the number of trades in his account, the victim may not be aware that the trades are excessive under the circumstances. See Hecht v. Harris, Upham & Co., 283 F.Sup. 417, 433 (N.D. Cal. 1968), modified on other grounds, 430 F.2d 1202 (9th Cir. 1970); See also Note, Churning by Securities Dealers 80 Harv.L. Rev. 869 (1967). Further, the victim of a churning scheme may not be aware that the high number of trades is induced by a broker anxious to earn even more commissions. See Hecht v. Harris, Upham & Co., supra, at 433.

Thus, the present case is clearly distinguishable from cases which have upheld an agreement to arbitrate when the plaintiff is aware of his claim but knowingly chooses to assert that claim in an arbitration forum. See, e.g., Moran v. Payne, Weber, Jackson & Curtis, 389 F.2d 242 (3rd Cir. 1968); Korn v. Franchard Corporation, 388 F.Sup. 1326 (S.D.N.Y. 1975).

Bache does not assert that Seymour was aware of the possible claim against it when he signed the margin agreements. Any such assertion by Bache would be untenable since the complaint read as a whole denies that Seymour had such knowledge, and the allegations of the complaint must be deemed to be true.[6] Indeed, Judge Tenney found that:

> The waiver contained in the instant arbitration clause, signed in December 1970, even if after some of the alleged violations had occurred, was sufficiently in advance of the existence of a controversy to void the agreement. Plaintiff

[6] See Maheu v. Reynolds & Co. 282 F.Sup. 423, 428 (S.D.N.Y. 1967)

was simply not in a position in December of 1970 to make a voluntary and intelligent waiver of important rights. The fraudulent scheme charged in the complaint was on-going and extended well beyond December of 1970. Thus, even if acts prior to that date could arguably be the subject of an arbitration agreement, clearly those later acts would not properly be the subject of a valid agreement.

The margin agreement signed by plaintiff on June 4, 1973, when he returned his account to Bache is likewise of no avail. When plaintiff returned to Bache in 1973 a new relationship was instituted. The margin agreement signed in furtherance of this new agreement cannot be construed as granting a waiver retroactively to all past acts, particularly those the subject of the previous business relationship. Even if it could be argued that the dates of the margin agreements might confer jurisdiction as to some transactions and not as to others, judicial economy dictates that this entire matter be tried in one forum. This conclusion is further supported by the apparent presence of defendant Canaan as the common thread that runs throughout the scenario. App. of Petition, pp. 8a, 9a.

In short, the margin agreements are waivers in advance of a controversy and such waivers should not be upheld by the Courts. Wilko v. Swan, supra, at 438, n. 31 citing Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945).

POINT II

THE DOCTRINE OF WILKO v SWAN IS APPLICABLE TO VIOLATIONS OF THE 1934 ACT

Wilko deals with alleged violations of Section 12 of the 1933 Act. Bache asserts in a rather oblique fashion that since the complaint alleges violations of the 1934 Act but not the 1933 Act, Wilko is not applicable to the present action. Pt. Brief Page 2.[7] Bache contends that the recent United States Supreme Court decision in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) supports its position.

The cases decided before Scherk v. Alberto-Culver Co., supra, clearly hold that Wilko is applicable to violations of the 1934 Act. See Maheu v. Reynolds & Co., supra; Stockwell v. Reynolds & Co., 252 F.Sup. 215 (S.D.N.Y. 1965); Reader v. Hirsch & Co., 197 F.Sup. 111 (S.D.N.Y. 1961). Scherk does not change the impact of these cases.

Scherk is based on the ground that in an international business transaction between parties of similar bargaining strength an arbitration provision should be enforced. Scherk v. Alberto-Culver Co., 417 U.S. at 515, 516; see also Note - Arbitration Clauses in International Contracts and the Extra Territorial Reach of the Securities Exchange Act of 1934 in Light of Scherk v. Alberto-Culver Co., 26 Syracuse L.Rev. 995 (1975); Note - Arbitration and Securities Regulation - Conflict Between Federal Arbitration Act and Securities Exchange Act in an International Transaction 40 Mo. L.Rev. 527, 534 (1975).

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[7] This issue is presented in the petitioner's brief as the third question presented to the Court but Bache does not otherwise deal with this issue in its petition.

There is one reported case which deals with the impact of Scherk on Wilko. In Newman v. Shearson, Hammill & Co., Incorporated, 383 F.Sup. 265 (W.D. Tex. 1974), the court noted that Scherk did not overrule Wilko since Scherk is only applicable to international business transactions. Judge Tenney properly followed the Newman decision. See Petitioner's App. p.10(a).

The 1934 Act contains a similar non-waiver provision as the 1933 Act. Compare §29(a) of the 1934 Act, 15 U.S.C. 78cc with §14 of the 1933 Act, 15 U.S.C. 77n. The court's holding in Wilko was grounded on the conclusion that the intention of Congress concerning the sale of securities is better carried out by holding arbitration agreements invalid. Wilko v. Swan, 417 U.S. at 438. Certainly, Congress expressed similar concern with respect to claims under the 1934 Act. See, §29(a) of the 1934 Act, 15 U.S.C. 78cc (non-waiver provision); §10 of the 1934 Act, 15 U.S.C. 78j (fraud provision); §18 of the 1934 Act, 15 U.S.C. 78r (liability for misleading statements); §20 of the 1934 Act, 15 U.S.C. 78t (liabilities of controlling persons); §27 of the 1934 Act, 15 U.S.C. 78aa (exclusive jurisdiction provision).

POINT III

BACHE OFFERS NO REASON WHY THE COURT SHOULD GRANT THE WRIT OF CERTIORARI

Bache offers no argument why the Court should grant a writ of certiorari. Such an argument is required in all petitions for certiorari. See Supreme Court Rule 23(1)(h).

Bache does not claim that the Second Circuit decision is in conflict with the decision of another Court of Appeals. Clearly, there is no important state or territorial question of law involved in this action. The Second Circuit simply followed the Supreme Court decision in Wilko. Under these circumstances, the Court should not grant a writ of certiorari. See Supreme Court Rule Section 19(1)(b).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: New York, New York
August 10, 1976

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